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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-127

GARY MESSINA,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Opinion Below

The Superior Court of New Jersey, Appellate Division, affirmed the Petitioner's conviction on February 24, 1978, in an unreported opinion (Pa11). The New Jersey Supreme Court denied a subsequent Petition for Certification on May 2, 1978. *State* v. *Messina,* —— N.J. ——, —— A.2d —— (1978).

Jurisdiction

The Court has jurisdiction to consider this matter pursuant to 28 U.S.C.A. §1257(3).

Questions Presented

1. Whether a trial court has an obligation to caution a testifying defendant, represented by counsel, about the consequences of his confessing to the offense before the jury.

2. Whether this case is a proper one for consolidation with *Corbitt* v. *New Jersey*, prob. juris. noted 46 U.S.L.W. 3526 (1978).

Statute Involved

This matter involves the question of whether the Petitioner was denied a fair trial under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. It is alleged that before the Petitioner admitted his guilt during cross-examination before the jury, he should have been warned by the trial court of the consequences of such action.

This matter also involves the constitutionality of the sentencing scheme of the New Jersey murder statutes, N.J.S.A. 2A:113-1, 2, 3 and 4, as judicially altered in *State* v. *Funicello*, 60 N.J. 60, 286 A.2d 55 (1972), cert. den. sub nom. *New Jersey* v. *Presha*, 408 U.S. 942 (1972). As modified by the New Jersey Supreme Court, N.J.S.A. 2A:113-3 now provides that no plea of guilty shall be received upon any indictment for murder. If such a plea is offered, it must be disregarded, a plea of not guilty must be entered, and a jury duly impaneled must try the case. The statute

permits, however, the accused to plead *non vult* or *nolo contendere* to the indictment. Upon such a plea, the sentence to be imposed is either life imprisonment or, in the alternative, the same as that imposed upon a conviction of second degree murder.

N.J.S.A. 2A:113-4 provides that every person convicted of first degree murder shall be sentenced to life imprisonment.[1] Upon a conviction of second degree murder, an accused is to be imprisoned for a maximum of thirty years. Thus, one convicted of first degree murder by a jury must receive a life sentence while one pleading *non vult* or *nolo contendere* may receive a sentence having a maximum of thirty years or life imprisonment.

Statement of the Case

An Essex County, New Jersey, Grand Jury returned an indictment against the Petitioner, Gary Messina, and one Anthony Flora, Jr., on July 29, 1976, charging both with violations of N.J.S.A. 2A:98-1, conspiracy; N.J.S.A. 2A:113-1, murder; and N.J.S.A. 2A:151-5, commission of said murder with a pistol. On November 29, 1976, a trial by jury commenced.

During the course of the trial, the Petitioner took the witness stand on his own behalf. In essence, he claimed that his co-defendant, Anthony Flora, Jr., had committed the murder unassisted by Messina (7T73 to 7T173).

After extensive cross-examination by the State, defense counsel for Petitioner requested that he be permitted to

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[1] Prior to *Funicello* v. *New Jersey*, 403 U.S. 948 (1971), and *State* v. *Funicello*, *supra*, 60 N.J. 60 (1972), a jury conviction of first degree murder mandated the imposition of the death penalty unless the jury recommended life imprisonment.

speak to his client out of the presence of the co-defendant. After this discussion, counsel indicated that his client wished to enter a plea of guilty to part of the indictment (8T101-22 to 23). It was Petitioner's wish to plead guilty to the counts charging armed murder but not to the count charging conspiracy (8T102-1 to 16). The State indicated that it would not recommend dismissal of the conspiracy count (8T103-1 to 10). The trial court would not accept the plea as offered by the defendant.

Resuming cross-examination, the Prosecutor asked his next question. Petitioner volunteered that he wished to plead guilty to armed murder and that Anthony Flora was not involved (8T106-21 to 25). He then admitted that he, Messina, had conceived and executed the plan to kill the victim. It was his claim that since the co-defendant was not involved, he wanted the blame to be properly placed. Two rebuttal witnesses for the State later testified that they overheard Messina state to his co-defendant, while they were in a cell during a recess, that Messina was going to "take the weight" or "go down on this." (9T121-1 to 8).

The jury later returned a verdict of guilty on all three counts of the indictment. For the murder, the Petitioner was sentenced to a mandatory term of life imprisonment.

ARGUMENT

POINT I

The petitioner has not presented for review any important federal question.

The Petitioner claims that he was denied due process by the trial court's failure to advise him, *sua sponte*, of the consequences of his confessing to the murder before the jury. In support of this contention, he relies upon those cases concerning the necessity to so advise a defendant who wishes to plead guilty to a criminal charge. Simply put, those cases are inapposite and do not support his theory.

A plea of guilty is something unique in the criminal justice process. A defendant pleading guilty admits before a court that he committed a crime and such a plea is the sole basis upon which the conviction stands. By entering a guilty plea he waives his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969). Thus, a guilty plea must be voluntary and knowing if it is to comport with due process.

The situation in the instant matter cannot be compared to the formal plea of guilty. The Petitioner, by confessing before the jury, did not waive those constitutional rights associated with a guilty plea. He did not need to be afforded any greater protection than any other defendant who is being cross-examined by a prosecutor.

Further, the Petitioner cannot implicate the case law pertaining to guilty pleas simply because he chose to

couch his confession in terms of a guilty plea. The constitutional requirements for the taking of a guilty plea apply only to that portion of the criminal justice process by which a defendant enters a plea as the sole basis for an adjudication of his guilt. Here, the Petitioner took the witness stand on his own behalf and subjected himself to cross-examination as any other witness. *United States* v. *Lowe*, 234 F.2d 919 (3 Cir. 1956), *cert.* den. 352 U.S. 838 (1957); *Myers* v. *United States*, 390 F.2d 793 (9 Cir. 1968), *cert.* den. 393 U.S. 880 (1968); *United States* v. *Fratello*, 44 F.R.D. 444 (D.N.Y. 1968).

POINT II

This case is not the appropriate vehicle by which to reappraise and reformulate the law applicable to guilty pleas.

Petitioner claims that this case "affords the Court a unique opportunity to harmonize disparate views among members of the Court concerning the judicial effect to be given extra-judicial and judicial confessions and admission." (Pb19). The State of New Jersey contends, however, that no disparate views have been expressed by this Court with regard to the issue here—the in-court confession before a jury.

In recapitulating the "various strands of judicial reasoning" in the areas of confessions and guilty pleas, the Petitioner shows no nexus between those cases and the situation presented here. The confession did not result from custodial interrogation in the *Miranda** sense nor can it be equated with the entry of a guilty plea. There is no important constitutional question involved.

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* *Miranda* v. *Arizona*, 324 U.S. 436 (1966).

POINT III

This is not a proper case for consolidation with *Corbitt* v. *New Jersey*.

Although the Petitioner was convicted and sentenced under the same sentencing scheme* as that involved in *Corbitt* v. *New Jersey*, prob. juris. noted 46 U.S.L.W. 3526, this is not an extraordinary case which should be consolidated. Should this court rule in favor of the appellant in *Corbitt*, the Petitioner here would derive any benefit from a finding of unconstitutionality of the statute.

Initially, it should be pointed out that the Petitioner did not attack the constitutionality of the New Jersey murder statute in his appeal to the Superior Court, Appellate Division. It was only when he petitioned for certification in the New Jersey Supreme Court that he raised this issue. He has not given the state courts the opportunity to rule on this question of federal constitutional law, and has thus not exhausted his state remedies. *Evans* v. *Delaware County, Com. of Pa.*, 390 F.2d 617 (3 Cir. 1968), *cert.* den. 393 U.S. 873 (1968); *Stanford* v. *Texas*, 379 U.S. 476 (1964), reh. den. 380 U.S. 926 (1965); *Douglas* v. *California*, 372 U.S. 353 (1963), reh. den. 373 U.S. 905 (1963).**

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* N.J.S.A. 2A:113-1, *et seq.*

** Contrary to the suggestions in the Petition, there is no indication in the record that Petitioner wished to plead guilty to avoid the mandatory sentence of life imprisonment.

CONCLUSION

For the foregoing reasons, the State of New Jersey respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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